Filed 4/12/19 Dept. of Social Services v. State Personnel Bd. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Appellant, v. STATE PERSONNEL BOARD, Defendant and Respondent; ELIZABETH TUCKWELL, Real Party in Interest and Respondent.	A154024 (Alameda County Super. Ct. No. RG16845105)

As an attorney for the Department of Social Services (DSS), Elizabeth Tuckwell handled administrative actions in the Community Care Licensing Division before the Office of Administrative Hearings. In 2011, the DSS issued a notice of adverse action to Tuckwell, suspending her from her position for 60 days based in part on allegations she had mishandled a license revocation matter. After a full hearing, an administrative law judge (ALJ) determined her suspension should be reduced to a letter of reprimand because Tuckwell had already been disciplined for the conduct alleged in the notice of adverse action, and she could not be disciplined twice for the same conduct. The State Personnel Board (SPB) adopted the ALJ's decision.

The DSS filed a petition for writ of administrative mandate, which the trial court denied. The DSS appeals, contending the SPB's decision must be set aside because the

DSS's legitimate attempts to correct Tuckwell's substandard work and bring her into minimum compliance with job expectations did not constitute discipline. We affirm.

I. BACKGROUND

This is the second appeal in this case. We incorporate by reference the factual and procedural history from our prior nonpublished opinion, *Tuckwell v. State Personnel Board* (June 25, 2015, A140865) (*Tuckwell I*). Below, we summarize only those facts necessary to our decision.

Tuckwell began working as a staff attorney for the Community Care Licensing Division of the DSS in December 2003. In 2009, Tuckwell was assigned responsibility for the *Chanticleer* case—a license revocation proceeding against a residential care facility for the elderly. Tuckwell represented the DSS at the administrative hearing on the case over the course of 16 days in January and February 2010.

Darryl East was Tuckwell's supervisor at all times relevant to this appeal. East testified that in January 2010 he had concerns about Tuckwell's failure to comply with a court order to prepare exhibits for the hearing in the *Chanticleer* matter. He also testified he was concerned in November 2009 about Tuckwell's handling of a Criminal Background Check Bureau (CBCB) case to which Tuckwell had been assigned.[1]

On February 4, 2010, East sent an e-mail to the entire Oakland enforcement unit of the DSS, describing a change in office procedure by which, going forward, only one individual would be handling CBCB cases. The e-mail explained Tuckwell would be given responsibility for all CBCB cases beginning the following month, "thus relieving the rest of you of the duty to do CBCB calendar."

Also, on February 4, 2010, East sent an e-mail to Tuckwell, stating: "This is to memorialize our conversation of today: [¶] 1. I gave you 30 days['] notice that beginning on March 4, 2010, you will not be teleworking any longer, the expectations [*sic*] being that you will be in the office on a daily basis, unless there is an approved absence. [¶]

[1] The DSS represents the CBCB in criminal background check cases in which an individual with prior criminal history challenges the CBCB's denial of an exemption for them to work in a licensed care facility.

2. You will be taking over all CBCB cases starting March 15, 2010. [¶] 3. We re-assigned all of your non-CBCB cases to other attorneys in the office. [¶] 4. On all cases assigned to you, I would like you to prepare the exhibits, witness list, and have all your questions in written form. All this is to be in a trial binder at least one week before the hearing occurs. [¶] 5. At least one week prior to any scheduled hearing, I would like you to schedule a time with either myself, Kathi Gilmour-Benner, or Leslie Evans so as to review the trial binder and discuss the case. [¶] If you have any questions about this, please advise me immediately so that we can discuss. Thank you."

Approximately one year later, the DSS issued a notice of adverse action, suspending Tuckwell from her position for 60 days for conduct alleged to be in violation of Government Code section 19572. Many of the charges in the notice were based on Tuckwell's alleged mishandling the *Chanticleer* case. Specifically, the notice alleged Tuckwell (1) failed to comply with an order to prepare exhibit binders for the administrative hearing, (2) arrived late to the hearing, (3) failed to timely secure and prepare witnesses, (4) was unprepared at the hearing, and (5) asked secretarial staff to do paralegal work.

Initially, an ALJ upheld the 60-day suspension. Tuckwell sought a writ of administrative mandate, asserting several due process violations prevented her from adequately presenting her case. The trial court granted the petition for writ of mandate. The DSS appealed, and we affirmed the trial court's decision, remanding the matter for the SPB to conduct a new hearing. (*Tuckwell I*, *supra*, A140865.)

In the second administrative hearing, ALJ Hugh K. Swift heard testimony over the course of 11 days and issued a 57-page decision with his findings of fact and conclusions of law. As relevant to this appeal, Tuckwell asserted as an "affirmative defense" that the actions described in East's February 4, 2010 e-mail were disciplinary in nature, and that she could not be disciplined twice for the same incidents. ALJ Swift found Tuckwell proved her defense. Specifically, ALJ Swift observed the notice of adverse action alleged Tuckwell failed to adequately prepare for the *Chanticleer* hearing which began on January 4, 2010, and thus, ALJ Swift found "it is reasonable to infer that when East

terminated [Tuckwell's] Telework privileges on February 4, 2010, it was because he had concerns regarding [Tuckwell's] perceived lack of preparedness for the Chanticleer hearing." ALJ Swift also noted East testified he terminated Tuckwell's telework privileges because he was concerned about the manner in which she prepared cases for hearing. Based on that testimony, his failure to explain his decision to impose the other conditions of employment stated in the February 4, 2010 e-mail, and the proximity in time between East's decision to terminate her telework privileges and the *Chanticleer* hearing, ALJ Swift determined East's actions were taken to discipline Tuckwell for her performance in the *Chanticleer* case.

As to the content of the February 4, 2010 e-mail East sent to Tuckwell, ALJ Swift observed it did not contain any language typically found in a corrective memorandum or any suggestion it was sent to Tuckwell to provide her with guidance and counseling, nor did it reference any specific event or incident of misconduct. Further, East never spoke with Tuckwell regarding his concerns related to her performance in the *Chanticleer* case, nor did he tell her he thought her performance was deficient in terms of preparing cases for hearing.[2] ALJ Swift found Tuckwell "established the termination of her Telework privileges and other conditions on her employment were not intended to put [her] on notice of the need for improvement or to provide guidance in terms of correcting deficiencies in her job performance."

ALJ Swift also found no clear nexus between the employment conditions imposed and the alleged deficiencies in Tuckwell's performance. Tuckwell was not expected to prepare the CBCB cases for hearing—legal analysts gathered and organized relevant documents and exhibits. Also, East required Tuckwell to prepare a trial binder which

[2] At oral argument, counsel for DSS conceded East never discussed with Tuckwell the need for performance improvement or counseled her with respect to the items mentioned in the February 4, 2010 e-mail. DSS counsel did suggest East had a conversation with Tuckwell in which he expressed "dismay and confusion" regarding her failure to prepare exhibit binders as ordered for the administrative hearing, but the record reflects that telephone conversation took place on January 6, 2010 and did not concern Tuckwell's need to improve her performance.

included a witness list and questions for witnesses, even though the DSS rarely calls witnesses in CBCB cases. ALJ Swift concluded, "These additional conditions East imposed on [Tuckwell], in combination with East never speaking with [Tuckwell] regarding her performance issues, were not intended to provide [Tuckwell] with a legitimate opportunity to improve her case preparation skills." Further, Tuckwell established the reassignment to CBCB cases and other conditions "significantly changed the nature of [her] job duties and limited her opportunities for promotion within state service."

ALJ Swift dismissed the charges related to the *Chanticleer* case and modified the 60-day suspension to a letter of reprimand. The SPB adopted ALJ Swift's decision as its own.

The DSS sought a writ of administrative mandate, arguing the SPB's decision must be reversed because it was unsupported by either the law or the undisputed evidence in the record. The trial court denied the petition, and the DSS filed this appeal.

II. DISCUSSION

A. *Standard of Review*

As an initial matter, the parties disagree about the applicable standard of review. The DSS contends the sole issue in this appeal is whether the SPB correctly applied the legal standard as to what constitutes " 'prior discipline,' " a mixed question of law and fact subject to de novo review. Tuckwell, on the other hand, contends substantial evidence review applies, both because we owe substantial deference to the SPB's factual findings due to its constitutional status, and because de novo review does not apply to the determination of appropriate discipline.

The SPB is an administrative agency of constitutional authority, and as such, its factual determinations are reviewed to see if they are supported by substantial evidence. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 217, fn. 31; *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35 [decisions of constitutional agencies are reviewed for substantial evidence, even when vested rights are involved].) In reviewing a decision of the SPB on a petition for administrative

mandamus, we view the record in the light most favorable to the SPB decision and uphold its factual findings if they are supported by substantial evidence. (*County of Siskiyou v. State Personnel Bd.* (2010) 188 Cal.App.4th 1606, 1615.) " 'We do not reweigh the evidence; we indulge all presumptions and resolve all conflicts in favor of the board's decision.' [Citation.] However, insofar as an appeal from an administrative mandamus proceeding presents questions of law, our review is de novo." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 742.)

As we explain below, we conclude the SPB's factual findings are supported by substantial evidence and it correctly applied the relevant legal principles in its analysis.

B. *Prior Discipline*

Under SPB precedent, an employee who has already been subject to discipline cannot be disciplined again based on the same incident or incidents. (*In re Bazemore* (1996) SPB Dec. No. 96-02, at pp. 9–10 (*Bazemore*); *In re Richins* (1994) SPB Dec. No. 94-09, at pp. 9 (*Richins*).) An employee who contends he or she was disciplined twice for the same conduct bears the burden of demonstrating the employer's prior action was disciplinary. (*Bazemore*, at pp. 11–12.)

Here the SPB found Tuckwell proved her "affirmative defense" because the preponderance of the evidence showed the actions described in East's February 4, 2010 e-mail were disciplinary. This is a factual determination, subject to substantial evidence review. As the SPB explained in *Richins,* "While the Board stands by its policy that a department should not discipline employees twice for the same incidents of poor performance or misconduct, attempts by the administrative law judges to answer the difficult question of what measures taken by the departments are disciplinary in nature have yielded conflicting results. [¶] . . . [T]he question of whether an employee is being disciplined twice for the same misconduct will be decided on a case-by-case basis. The former actions of the employer with respect to a particular incident or course of misconduct will be evaluated to determine whether the actions taken were truly disciplinary in nature and effect." (*Richins, supra*, SPB Dec. No. 94-09, at p. 9.) In *Bazemore,* the SPB expanded on the discussion in *Richins*, noting the factual nature of

the inquiry and explaining under the "specific facts" of *Richins,* the language used in the documentation at issue and the circumstances surrounding its issuance evidenced an intent that the document was disciplinary in nature and effect. (*Bazemore, supra*, SPB Dec. No. 96-02, at p. 10.) In *Bazemore,* by contrast, the numerous counseling memoranda issued to the employee contained ambiguous language and there was no extrinsic evidence the memoranda were intended to be disciplinary, so the agency was not precluded from relying on the same incidents for the subject adverse action. (*Id.* at p. 12.) As both of those cases make clear, the determination whether a particular employment action is intended as discipline is a fact-specific inquiry that requires assessment of the totality of the circumstances surrounding the alleged misconduct, the employer's response, and the employer's policies and procedures.

Substantial evidence supports the SPB's finding here that the termination of Tuckwell's telework privileges, reassignment of her caseload, and other conditions imposed were disciplinary actions. First, the February 4, 2010 e-mail was sent shortly after East became concerned about Tuckwell's handling of the *Chanticleer* matter. It is a reasonable inference given the proximity in time between Tuckwell's missteps in the *Chanticleer* matter and East's e-mail that Tuckwell was being disciplined for her conduct in that case.

Second, the finding that the actions were disciplinary rather than corrective is supported by the absence of any evidence East discussed Tuckwell's performance with her. He did not give her a performance review in the four years he supervised her, never discussed her performance on the *Chanticleer* case with her, and did not tell her at the February 4, 2010 meeting that he was concerned about her performance and was implementing measures to track and improve it. Further, East's February 4, 2010 e-mail makes no reference to counseling, providing Tuckwell opportunities to improve, or suggestions that she may be disciplined for the same conduct in future. In addition, Tuckwell presented evidence that in the past, when East had counseled Tuckwell, he issued a "corrective memo" which stated: "This corrective memo is not intended to be disciplinary in nature but rather is an attempt to correct your behavior. If, however, your

behavior does not improve, this memorandum may be used in a future action against you." East's e-mail contained no similar admonition.[3]

Third, the DSS focuses almost entirely on the (arguably inaccurate) inference that elimination of Tuckwell's telework privileges would result in her greater presence in the office[4] and assigning her to easier cases and imposing further case preparation and review requirements reflect an intent to help her improve her performance, but it ignores the evidence that East's actions dramatically altered the nature of her job. East reassigned all of Tuckwell's cases to different attorneys. Moreover, it is undisputed CBCB cases were the most routine and straightforward hearings and rarely required witnesses to be presented by the DSS staff.[5] Tuckwell testified the assignment to exclusively work on CBCB matters was "the lowest level work that would be assigned to any attorney" and would affect her ability to be promoted because they "would not provide the opportunity to demonstrate the attorney's ability to perform higher-level work." The significant change in the nature of the work she was performing and opportunity for advancement supports the SPB's determination the action was intended as discipline rather than as "a legitimate opportunity to improve her case preparation skills."

The DSS also contends Tuckwell's own testimony shows East's actions were intended to improve her work performance and not to discipline her. But the excerpts of testimony it cites include Tuckwell's statements East never discussed the *Chanticleer*

---

[3] Tuckwell asks us to take judicial notice of a guide published by the California Department of Human Resources which specifically informs employers of the importance of issuing a "Corrective Memorandum that includes a 'Bazemore warning' " advising the employee of the consequences if the employee fails to improve his or her performance. The DSS has not opposed the request for judicial notice. Because we conclude the record evidence is sufficient to support the SPB's factual findings, however, we deny the request for judicial notice because it is unnecessary to our decision.

[4] Both Tuckwell and East testified Tuckwell rarely took advantage of teleworking, so it is by no means clear that elimination of the privilege would result in her spending more time in the office.

[5] Indeed, as East testified, CBCB cases are the simplest cases handled by the legal division and the attorney should be on "autopilot" when presenting a CBCB case.

matter with her, never gave her any reason for his actions, and her own "thought" that if he intended to discipline her, he should have asked for her side of the story. Though Tuckwell testified, "There was just no indication of it after the *Chanticleer* hearing that Mr. East was going to pursue discipline against me," she made that remark in the context of explaining other attorneys had made more serious errors without receiving discipline from the DSS and East never discussed her performance in *Chanticleer* with her. Her testimony suggests she did not feel there was a reason for her to be disciplined and based on East's failure to discuss it with her, she did not anticipate imposition of the conditions she considered disciplinary. The DSS also critiques Tuckwell for admitting she had no idea what motivations East had for assigning her to CBCB cases, but later in its opening brief points out that "Tuckwell, of course, is not competent to testify about East's motivation for taking the remedial actions." In any event, we must indulge all presumptions and resolve all conflicts in favor of the SPB's decision. (*Furtado v. State Personnel Bd.*, *supra*, 212 Cal.App.4th at p. 742.) Under this standard, the DSS has not shown Tuckwell's testimony establishes East's actions were intended as corrective rather than disciplinary actions.

Finally, the DSS contends the SPB misapplied the law to the facts of this case in determining East's actions were disciplinary, because when an employer's intent is ambiguous, the employer's actions must be construed as nondisciplinary as a matter of law. Whether the SPB used an incorrect legal standard or misapplied the law to undisputed facts is a question we review de novo.[6] (See, e.g., *Thaxton v. State Personnel Bd.*, *supra*, 5 Cal.App.5th at p. 692 [in most instances mixed questions of fact and law are reviewed de novo]; *Air Couriers Internat. v. Employment Development Dept.* (2007)

[6] Whether a mixed question of law and fact involving the application of law to a set of facts is subject to de novo or substantial evidence review depends on the nature of the inquiry. (See, e.g., *Thaxton v. State Personnel Bd.* (2016) 5 Cal.App.5th 681, 692.) Because we find no error under independent review, we need not decide which standard should apply here.

150 Cal.App.4th 923, 932 [determination of correct legal standard is question of law subject to de novo review].)

In *Bazemore,* the SPB explained, "In many cases . . . extrinsic evidence of the [employer's] intent is elusive and the language used in the documentation of an incident or incidents is so ambiguous that the [SPB] cannot positively discern whether the document was to memorialize a counselling session or to constitute a progressive disciplinary measure." (*Bazemore*, *supra*, SPB Dec. No. 96-02, at p. 11.) It emphasized that the SPB "wants to encourage supervisors and managers to provide guidance and counselling to employees where appropriate," and so "where there is no clear extrinsic evidence that the documentation was disciplinary and where the language in the documentation is so ambiguous, such that a reasonable person cannot readily determine whether the documentation was intended to be disciplinary, the [SPB] will not construe the documentation as disciplinary." (*Id.* at pp. 11–12.)

The DSS contends ALJ Swift "*conceded*" the evidence was ambiguous in this case because he emphasized that East never explained his decision to impose new workplace conditions and made no express references to his intent. We disagree. ALJ Swift did not suggest the e-mail was ambiguous, but expressly noted it contained no language suggesting it was given to provide guidance and counseling. He also concluded the e-mail did not mention any specific event or incident of misconduct, and thus was insufficient to document misconduct as a basis for a future adverse action. This stands in stark contrast to the facts of *Bazemore,* in which the employer issued several memoranda, expressly labelled " 'Counseling Memorandum,' " that told the employee she would be marked absent for specific incidents, reminded her of the employer's attendance policy, and warned her that if her behavior continued, adverse action would be taken. (*Bazemore*, *supra*, SPB Dec. No. 96-02, at p. 4.) Unlike the language in *Bazemore*, East's e-mail did not imply or suggest the measures were being implemented to give Tuckwell a chance to improve her performance.

More importantly, even if the language in East's e-mail is ambiguous, the *Bazemore* rule requiring a presumption of nondisciplinary action applies when there is *no*

extrinsic evidence the action was intended to be disciplinary. (*Bazemore, supra, supra*, SPB Dec. No. 96-02, at pp. 11–12.) But here ALJ Swift identified and discussed the extrinsic evidence showing the actions were intended as discipline. First, East did not discuss Tuckwell's performance with her at any point, including when he imposed the reassignment and employment conditions, which is strong evidence the measures were not intended to help her improve. Second, ALJ Swift found the measures would not help improve Tuckwell's performance. For example, the DSS argued East removed Tuckwell's telework privileges because he was concerned about her ability to prepare cases for hearing and believed she could better work on this issue if she was in the office. But both Tuckwell and East testified she rarely took advantage of the telework privilege, so removing it would not result in her being in the office more to work on the alleged deficiencies in her performance. In addition, ALJ Swift noted there was "no clear nexus between the other conditions imposed on [Tuckwell's] employment and the alleged deficiencies in her job performance." East imposed conditions requiring Tuckwell to prepare trial binders for all cases assigned to her, but CBCB cases were prepared by legal analysts who organized the materials for hearing. Further, though Tuckwell was expected to prepare witness lists and write out questions for witnesses, it is undisputed witnesses were rarely called in CBCB cases. Finally, the reassignment of her caseload and other conditions imposed significantly impacted the nature of Tuckwell's job duties and her opportunities for advancement. Because there was substantial extrinsic evidence supporting a reasonable inference the actions were intended to be disciplinary, the *Bazemore* nondisciplinary presumption did not apply.

The DSS also argues "ALJ Swift misconstrued the *Bazemore* case, incorrectly interpreting it as holding that the so-called '*Bazemore* language' is a mandatory component of a counseling or corrective memorandum, without which a state employer's action is automatically deemed disciplinary regardless of any other factors."[7] But ALJ

[7] In a footnote, the *Bazemore* decision suggested: "Ideally, if a department intends to document an incident of misconduct or poor performance short of taking formal adverse action, but wants to leave the door open for formal action based on the same

Swift's thoughtful decision contains no such analysis. Rather, he pointed to the language in *Bazemore* which advises managers and supervisors to use certain language if they intend to rely on incidents as grounds for future discipline and observed East's e-mail does not contain the "suggested *Bazemore* language, which would typically be found in a corrective memorandum." He did not suggest the language was mandatory but considered its absence along with all the other evidence of intent in reaching his conclusion.[8]

In sum, we conclude the SPB did not err in finding Tuckwell could not be disciplined a second time for her conduct in the *Chanticleer* case. As explained above, the question whether an employer's actions are disciplinary or corrective in nature is a fact-specific inquiry, dependent on the totality of the circumstances surrounding the incidents in question. Accordingly, we emphasize our decision is limited to the facts of this case and is grounded in our determination that the SPB's factual findings are supported by sufficient evidence in the record.

III. DISPOSITION

The judgment is affirmed. Tuckwell shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

---

incidents in the future, then it would clearly inform the employee of its intent. Thus, in such a case, a department might inform the employee in a written memorandum that: [¶] Your conduct on this occasion was unacceptable and will not be tolerated by this department. If you engage in similar conduct in the future, the department will take adverse action against you based on the incidents cited in this memorandum, as well as any future incidents." (*Bazemore*, *supra*, SPB Dec. No. 96-02, at p. 11, fn. 7.)

[8] Likewise, our decision to uphold the judgment and affirm the findings of the SPB on this record should in no way be construed as a holding that employers are *required* to include a *Bazemore*-type warning if they wish to avoid a finding their action was intended to be disciplinary in nature. We do note, however, this case provides a cautionary reminder that express statements to that effect, which could be easily incorporated in written documentation of corrective actions, would certainly assist employers in proving their intent to implement corrective action rather than discipline.

_____
MARGULIES, ACTING P. J.

WE CONCUR:

_____
BANKE, J.

_____
SANCHEZ, J.

A154024
Department of Social Services v. State Personnel Board